

Alternative Dispute Resolution Committee
Judicial Conference of Indiana Judicial Center

May 12, 2006
Minutes

1. Members Present. The following members of the committee were present: Chair, Judge David Avery; Mag. Daniel Burke; Sr. Judge Steve Frank; Mag. Edward Nemeth; Judge Matthew Headley; Comm'r. Oldham, and Judge Terry Shewmaker.
2. Staff Present. Jennifer Weber, Indiana Judicial Center. Ms. Julia Orzeske, Executive Director, Commission for Continuing Legal Education, provide assistance to the committee and staff.
3. Minutes. The committee approved the minutes from January 27, 2006.
4. 40-hr Mediation Training Program for Judges: Committee members reviewed the response, sent by Justice Dickson, to its request for training to be provided from the Supreme Court. The Court responded that "a full 40-hour curriculum is more than can be accommodated with time and resource constraints, but that the inclusion of some much shorter sessions on mediation skills for judges, as part of the Judicial Center's judicial education programs, is an appropriate possibility for consideration by the Judicial Conference Education Committee." (See Attachment 1). Mag. Burke suggested that perhaps the judicial discount for CLE's through ICLEF could be expanded to apply to mediation trainings. Judge Avery pointed out that due to the unavailability of funding, there was no real support for Supreme Court scholarships or sponsorship for mediation training.
5. Judicial Conference Mediation Presentations: Committee members discussed the previous mediation courses offered through the Judicial Center, specifically noting that the presentations did not address the "nuts and bolts" of the mediation process. Judge Shewmaker suggested that mediation courses could be presented in a 3-4 year period at conferences so that judges could meet the 40hr training requirement to be registered mediators. Judge Shewmaker also questioned how mediator qualifications and training factor into the statute allowing judges to mediate. Comm'r Oldham suggested dividing the training sessions to address family and civil matters individually.

For the Committee to determine what courses would be worthwhile, Mag. Nemeth thought it might be helpful to know how many judges have already gone through mediation training. Ms. Orzeske agreed to print a list of registered mediators, but could only determine who were active and inactive, rather than who were judges.

6. Ethical Concerns Regarding Mediators Giving Legal Advice to Pro Se Litigants: Judge Avery discussed the recent Indiana State Bar Association ADR section workshop which analyzed this issue along with potential developments to address the unique nature of a mediator's role in pro se cases. Judge Shewmaker noted the tension between wanting to help pro se litigants but the ethical limitations in so doing. Mag. Burke talked about his procedure of preparing decrees for pro se litigants because the ones submitted were incomplete. Judge Headly commented on using facilitators to draft documents in family mediation and Judge Avery discussed the possibility of recognizing a "facilitator" in the ADR rules to address ethical concerns. Mag. Burke wanted to know what type of requirements could be imposed on a facilitator, and Judge Oldham thought it was important to distinguish what information is considered "legal advice" to a pro se litigant. Committee members agreed to continue examining this issue.
7. Survey of ADR Caselaw: Committee members were provided with a website link to Mediation.com's website, which posts a monthly survey of national caselaw related to ADR, as well as a copy of a new ADR column in ISBA's *Res Gestae* publication which will be published quarterly and survey caselaw, statutory changes, and other relevant issues related to the field of ADR. Judge Avery noted that he spoke with representatives from IU –Indpls. School of Law and received a favorable response to the possibility of including a section on ADR in its law journal. Committee members felt at this time it would continue to rely on IJC staff to alert them to IN caselaw related to ADR, and it would be helpful to provide a survey of ADR law at the next Judicial Center annual conference; Judge Avery and Comm'r Oldham agreed to assist IJC staff in preparing those materials.
8. Statutory and ADR Rule Issues: Committee members examined a statute concerning private judges, specifically looking at IC 33-38-10-2, which designates the qualifications for a judge and eligible cases. (See Attachment 2). Members discussed whether increasing the scope of eligible cases would broaden the type of matters that could be tried before a private judge, as well as whether the statute ruled out the option of appellate judges serving as private judges. Committee members agreed to continue examining this issue.

Committee members also discussed the provision of ADR Rule 2.5(A)(5), concerning the qualifications of mediators. (See Attachment 3). Judge Avery noted that currently, magistrates, referees, and commissioners cannot act as mediators under ADR Rule 2.5(A)(5) because it states "[a]s part of the judge's judicial service, a judge may serve as a mediator in a case pending before another judicial officer" (emphasis added). Committee members discussed whether the term "judge" should be changed to "judicial officer" or the term "judge" should be defined to include other judicial officers, such as magistrates, referees, and commissioners. The members supported both options and the matter will be discussed in further detail at the next meeting.

9. New Caselaw Concerning ADR: Committee members discussed a recent Indiana Supreme Court opinion, *Fuchs v. Martin* (Attachment 4), which held that it was permissible for a trial judge to order parties to submit its disputes to mediation as a prerequisite to trial court adjudication of such disputes. Comm'r Oldham noted, as *Fuchs* did, the limits of requiring ADR prior to having access to court; for instance, the Comm'r commented that requiring parties to submit to binding arbitration prior to being able to file a case in court would limit court access and pose constitutional issues. Similarly, Committee members noted that compelling parties to complete ADR prior to filing a case for a civil jury trial, for instance, would compromise trial by jury rights.
10. Tabled Matters: Members agreed to discuss the use of senior judges to conduct judicial settlement conferences at the next meeting.
11. Future Meeting Date: Friday July 28, 2006, 10am-12pm at the Indiana Judicial Center.

Respectfully Submitted,

Jennifer L. Weber
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ATTACHMENT 1- S. Ct. Response to request for training

Brent Dickson/incourts

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> To

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> cc

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> Subject

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> Jud.ADR Comm. req. for mediation trng for judges

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> Judge Avery,

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> The Court discussed the Judicial ADR Committee's request for
> providing judicial education for judges in mediation. Our view is
> that a full 40-hour curriculum is more than can be accomodated with
> time and resource constraints, but that the inclusion of some much
> shorter sessions on mediation skills for judges, as part of the
> Judicial Center's judicial education programs, is an appropriate
> possibility for consideration by the Judicial Conference Education
> Committee. For those judges who desire the full 40-hour program,
> there are private courses available at IUPUI and perhaps at other
> law schools which interested individual judges may wish to pursue.

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> Brent

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ATTACHMENT 2- Private Judge Statute

IC 33-38-10-2

Persons who may act as private judge

Sec. 2. (a) A person who:

(1) has been but is not currently a judge of a circuit, superior, criminal, probate, municipal, or county court and has served in the capacity of judge for at least four (4) consecutive years;

(2) is admitted to the practice of law in Indiana; and

(3) is a resident of Indiana;

may act as judge for certain cases under this chapter.

(b) A person may act as a judge of a case under this chapter only if:

(1) all parties to the action file a written petition with the executive director of the division of state court administration consenting to the case being heard by a private judge, and naming the person whom the parties wish to have as private judge;

(2) the case is one over which the court in which the former judge served would have had subject matter and monetary jurisdiction;

(3) the case is founded exclusively on contract, tort, or a combination of contract and tort; and

(4) the case is one in which a utility (as defined in IC 8-1-2-1) is not a party.

As added by P.L.98-2004, SEC.17.

ATTACHMENT 3: Rules for ADR, Rule 2.5(A)

ADR Rule 2.5. Qualifications of Mediators

(A) Civil Cases: Educational Qualifications.

- (1) Subject to approval by the court in which the case is pending, the parties may agree upon any person to serve as a mediator.
- (2) In civil cases, a registered mediator must be an attorney in good standing with the Supreme Court of Indiana.
- (3) To register as a civil mediator, a person must meet all the requirements of this rule and must have either: (1) taken at least forty (40) hours of Commission approved civil mediation training in the three (3) years immediately prior to submission of the registration application, or (2) completed forty (40) hours of Commission approved civil mediation training at any time and taken at least six (6) hours of approved Continuing Mediation Education in the three (3) years immediately prior to submission of the registration application.
- (4) However, a person who has met the requirements of A.D.R. Rule 2.5(B)(2)(a), is registered as a domestic relations mediator, and by December 31 of the second full year after meeting those requirements completes a Commission approved civil crossover mediation training program may register as a civil mediator.
- (5) As part of the judge's judicial service, a judge may serve as a mediator in a case pending before another judicial officer.